

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ORIGINAL

United States Courts
Southern District of Texas
FILED

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AUG 19 2004

Michael N. Milby, Clerk

In re ENRON CORPORATION SECURITIES)
LITIGATION)

MDL Docket No. 1446

This Document Relates To:

Civil Action No. H-01-3624
(Consolidated)

MARK NEWBY, *et al.*, Individually and On)
Behalf of All Others Similarly Situated,)

Plaintiffs,)

vs.)

ENRON CORP., *et al.*,)

Defendants.)

CONSECO ANNUITY ASSURANCE)
COMPANY, Individually and on Behalf)
of All Others Similarly Situated,)

H-03-CV-2240

Plaintiff,)

v.)

CITIGROUP, INC., CITIBANK, N.A.,)
CITICORP, SALOMON SMITH)

BARNEY, SALOMON BROTHERS)
INTERNATIONAL LIMITED, *et al.*,)

Defendants.)

**CONSECO ANNUITY ASSURANCE COMPANY'S MEMORANDUM
IN RESPONSE TO THE FINANCIAL INSTITUTION DEFENDANTS'
SUPPLEMENTAL MEMORANDUM OF LAW DATED AUGUST 6, 2004**

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Conseco Annuity Assurance Company (“Conseco”) respectfully submits this memorandum in response to the Financial Institution Defendants’ *Supplemental Memorandum Of Law In Further Opposition To Lead Plaintiff’s Amended Motion For Certification Of A Class Based On Claimed Violations Of § 12(a)(2) Of The Securities Act Of 1933* filed with this Court on August 6, 2004 (the “Financial Institution Defendants’ Brief”).

**I. Federal Securities Law Claims Were First Asserted
On Behalf Of Citigroup CLN Purchasers On
September 29, 2002 – Not March 5, 2003 –
As The Financial Institution Defendants Incorrectly Contend**

The Financial Institution Defendants’ Brief, at page 11, footnote 4, erroneously states that claims arising under Section 12(a)(2) of the Securities Act of 1933, 15 USC § 77l(a)(2), (the “Securities Act” and “Section 12(a)(2)”, respectively) asserted by Conseco on behalf of purchasers of the Citigroup Credit Linked Notes¹ (“Citigroup CLNs”) are time-barred. As set forth below, the Financial Institution Defendants are incorrect.

This Court’s Order of February 25, 2004 correctly recognizes that federal securities law claims arising under Section 10(b) of the Securities Exchange Act of 1934, 15 USC § 78j(b) (“Section 10(b)”) were first asserted on behalf of all purchasers of Citigroup CLNs (including purchasers of Yosemite I Citigroup CLNs) in a complaint filed on September 29, 2002 (the “September 29th Complaint”). This class action was filed by Hudson Soft Company, Ltd. (“Hudson Soft”), which was later joined by Conseco who sought appointment as co-lead plaintiff

¹ The Citigroup Credit Linked Notes include the following securities: (a) Yosemite Securities Trust I 8.25% Series 1999-A Linked Enron Obligations maturing November 15, 2004, issued in the aggregate amount of \$750,000,000 on or about November 4, 1999; (b) Yosemite Securities Trust II 8.75% Series 2000 Linked Enron Obligations maturing February 2007, issued in the aggregate amount of £200,000,000 on or about February 23, 2000; (c) Credit Linked Notes Trust 8% Notes maturing August 15, 2005, issued in the aggregate amount of \$500,000,000 on or about August 25, 2000; (d) Credit Linked Notes Trust II 7 3/8 % Notes maturing May 15, 2006, issued in the aggregate amount of \$500,000,000 on or about May 24, 2001; (e) Enron Sterling Credit Linked Notes Trust 7 1/4% Notes maturing May 24, 2006, issued in the aggregate amount of £125,000,000 on or about May 24, 2001; and (f) Enron Euro Credit Linked Notes Trust 6 1/2% Notes maturing May 24, 2006, issued in the aggregate amount of 200,000,000 Euro on or about May 24, 2001.

in that action (with Hudson Soft) on November 27, 2002.² Consecro purchased millions of dollars of Yosemite I, ECLN I, and ECLN II Citigroup CLNs, and the Section 10(b) claims asserted in the September 29th Complaint were asserted less than three years after the issuance of any Citigroup CLNs (including the \$750 million of Yosemite I Citigroup CLNs first issued on November 15, 1999). Accordingly, Consecro has standing to assert such claims, and Consecro's Section 10(b) class claims are timely under this Court's Order of April 1, 2004 concerning the applicability of the one-year/three-year statute of limitations/statute of repose.³

On March 5, 2003, Consecro filed a class action complaint on behalf of purchasers of Citigroup CLNs (the "March 5th Complaint") that asserted claims against defendants for violations of Section 10(b), as well as claims for violations of Section 12(a)(2) of the Securities Act of 1933. Because the Section 12(a)(2) claims asserted in the March 5th Complaint arise out of the same "conduct, transaction, or occurrence" as the Section 10(b) claims asserted in the September 29th Complaint, the Section 12(a)(2) class claims relate back to the claims asserted against the defendants in the September 29th Complaint, and are therefore not time-barred as the Financial Institution Defendants incorrectly contend.⁴ See FRCP 15(c)(2). See also Dendinger

² See *Memorandum And Order Re: Imperial County Employees Retirement Systems' Motion To Intervene* dated February 25, 2004 ("the February 25th Order") at page 4 footnote 4.

³ From November 1999 through May 2001, Consecro purchased three of the six Citigroup CLN issues. Specifically, on November 4, 1999, Consecro, together with its affiliates, purchased \$17.1 million of Yosemite I Citigroup CLNs and has realized damages of \$3.9 million in connection with these notes. On or after July 1, 2001, Consecro, together with its affiliates, purchased \$27.85 million of ECLN I CLNs and has realized damages of \$6.74 million in connection with these notes. On or after May 17, 2001, Consecro, together with its affiliates, purchased \$31.1 million of ECLN II Citigroup CLNs and has realized damages of \$9.32 million in connection with these notes.

⁴ Consecro is the only party to have timely asserted Section 12(a)(2) claims pursuant to the relation-back doctrine, on behalf of itself and all purchasers of Citigroup CLNs, including Yosemite I Citigroup CLNs. In the Newby Action, the Court held that the federal securities claims asserted against the "added bank subsidiaries" in the Newby First Amended Consolidated Complaint did not relate back to Newby's First Consolidated Complaint, and found that Newby's First Amended Consolidated Complaint was filed on January 14, 2003 for statute of limitations purposes. See April 1, 2004 Order at 5. Because January 14, 2003 is more than three years from November 15, 1999 (the date on which \$750 million of the Yosemite I Citigroup CLNs were first issued), any Section 12(a)(2) claims purportedly asserted on behalf of purchasers of these securities in the Newby action are time-barred under this Court's April 1, 2004 Order. Id. Additionally, because no purchaser of Yosemite I Citigroup CLNs has come

v. First Nat'l Corp., 1989 U.S. Dist. LEXIS 8756 (E.D.La. July 27, 1989)(holding that plaintiffs' federal securities law claims related back to filing of their original complaint); Austin v. Loftsgaarden, 675 F.2d 168 (8th Cir. 182)(holding that plaintiffs' Section 12(a)(2) claims related back to the filing of plaintiffs' original complaint which asserted only Section 10(b) claims), rev'd on other grounds, 478 U.S. 647 (1986).

As the Court is aware, Consecoco is both the only purchaser of Citigroup CLNs to have timely asserted federal securities law claims on behalf of purchasers of Citigroup CLNs, and the only purchaser of Citigroup CLNs to have sought appointment as Lead Plaintiff on behalf of purchasers of Citigroup CLNs.

The Court has previously given other purchasers of Citigroup CLNs the opportunity to move to intervene in the Newby Action.⁵ On June 1, 2004, the Court ordered that individual notice be given to purchasers of certain Citigroup CLNs and other similar securities in order to inform them that that any Section 12(a)(2) claim that they might have in the Newby Action would be dismissed unless purchasers of these securities, who were capable of satisfying Section 12(a)(2)'s privity requirement, promptly stepped forward to represent the interests of such purchasers. Pursuant to the Court's June 1, 2004 Order, a Court-approved notice was sent to purchasers of these certain securities on June 15, 2004.

The Court's Order dated March 11, 2004 established August 2, 2004 as the deadline for joining new parties in the Newby and Tittle Actions. That August 2, 2004 deadline has come

forward in the Newby Action, there is no party with standing to assert the Section 12(a)(2) claims of Yosemite I Citigroup CLN purchasers in the Newby Action.

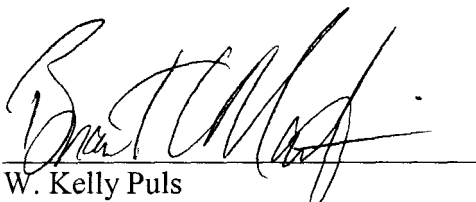
⁵ For the reasons set forth in detail in Consecoco's Partial Opposition To The Regents Of The University Of California's Motion For Leave To Give Notice To Certain Class Members Pursuant To Rule 23(d)(2) Of The Federal Rules Of Civil Procedure And Cross Motion For Leave To Give Notice To Purchasers Of Yosemite II, Sterling and Euro Citigroup CLNs ("Consecoco's Partial Opposition"), any motion to intervene in the Newby Action with respect to claims arising from the purchase of the Yosemite I CLNs would have been futile, because those claims, if asserted now, would be time-barred in the Newby Action. Consecoco's Partial Opposition at 6 n. 6.

and gone and no party with standing to assert claims on behalf of Citigroup CLN purchasers for violations of Section 12(a)(2) has moved to intervene in the Newby Action, despite dissemination of the Court-approved notice.

Conseco's Motion For Appointment As Lead Plaintiff, initially filed on November 27, 2002, and subsequently re-filed on May 12, 2004 pursuant to this Court's Order, has been fully briefed and remains sub judice. In addition to the reasons set forth in Conseco's Re-Filed Motion For Appointment As Lead Plaintiff and Conseco's Reply Memorandum In Further Support thereof, Conseco believes that, granting Conseco's motion for appointment as Lead Plaintiff at this time would serve the interests of justice and fully protect the rights of Citigroup CLN purchasers because: (i) since, and prior to, its initial filing, Conseco, showing its commitment to its role as leader and representative of the damaged Citigroup CLN purchasers, has been vigorously litigating the Conseco Action; reviewing and analyzing millions of pages of documents, and taking the depositions of key Citigroup employees, while also acting pursuant to this Court's Order as the principal representative for the Private Action Plaintiffs' Group; ii) Conseco is the only party before this Court with standing to pursue Section 12(a)(2) claims on behalf of purchasers of three of the six Citigroup CLNs (Yosemite I, ELCN I, and ECLN II), and no other Citigroup CLN purchaser with standing has come forward despite the dissemination of the Court-approved notice; and iii) this Court ordered Conseco to mediate the Citigroup CLN purchasers class claims asserted in the Conseco Action over one year ago on May 28, 2003 and again on June 26, 2003. By granting Conseco's motion for appointment as Lead Plaintiff, the Court would enable the only Citigroup CLN purchaser who has standing and has repeatedly demonstrated its undivided loyalty, commitment, and ability to represent the interests of the class of Citigroup CLN purchasers, to fully and effectively do so.

Dated: August 19, 2004

By:

A handwritten signature in black ink, appearing to read "Brant C. Martin", is written over a horizontal line.

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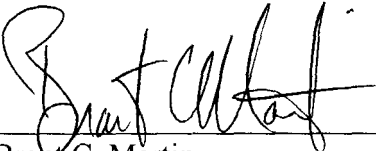
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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of August 2004, I caused a true and correct copy of the foregoing instrument to be served on all counsel of record by posting in PDF format to www.esl3624.com.



Brent C. Martin